IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
Nos. 06-61075 and 06-61076

JOHN AND CLAIRE TUEPKER,	APPELLEES/CROSS-APPELLANTS/PLAINTIFFS
VERSUS	
STATE FARM FIRE AND CASUALTY COMPANY AND JOHN DOES 1 THROUGH 10,	APPELLANT/CROSS-APPELLEE/DEFENDANT

***AMICUS CURIAE* BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF APPELLEES/CROSS-APPELLANTS JOHN AND CLAIRE TUEPKER**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel certify that the following listed persons and entities, as described in fourth sentence of the Fifth Circuit Local Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the Circuit Judges of this Court may evaluate possible disqualification or recusal:

A. Interested Parties:

1. United Policyholders, *Amicus Curiae*

2. John Tuepker and Claire Tuepker, Appellees/Cross-Appellants/Plaintiffs

3. State Farm Fire and Casualty Company, Appellant/Cross Appellee/Defendant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

MISCELLANEOUS

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The financial security that insurance policies provide is critical to business and property owners and to the fabric of our economy and our society. United Policyholders ("UP") is a unique non-profit charitable organization founded in 1991 that is helping preserve the integrity of the insurance system by serving as an information resource and a voice for policyholders' interests. Donations, grants and volunteer labor support the organization's work.

United Policyholders monitors the national insurance marketplace with a particular focus on regions impacted by large-scale natural disasters. The organization participates in public forums, disseminates claim process information, works with individuals and elected officials to solve insurance problems, and files *amicus* briefs in cases involving coverage and claim disputes. UP serves as a clearinghouse for information on coverage and claim issues related to commercial and personal lines insurance products.

United Policyholders has focused its efforts since the 2005 hurricane season on providing education and support to businesses and homeowners in the Gulf Coast states and working to solve insurance problems. The organization hosts a free on-line "Road Map to Recovery" for Florida, Louisiana and Mississippi, and created and is maintaining a Hurricane Claim Help Library for residents of the impacted states. United Policyholders has sent representatives to Mississippi and

Louisiana to provide support and educational services and is coordinating with elected officials by co-sponsoring public meetings and by providing witnesses for legislative hearings on insurance matters. For more information, visit www.unitedpolicyholders.org.

By submitting a brief in this matter, United Policyholders seeks to fulfill the "classic role of *amicus curiae* in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). This is an appropriate role for *amicus curiae.* As commentators have often stressed, an *amicus* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." Robert L. Stern, et al., *Supreme Court Practice* 570-71 (1986), *quoting* Bruce J. Ennis, *Effective Amicus Briefs*, 33 Cath. U. L. Rev. 603, 608 (1984).

United Policyholders has filed over two hundred and thirty-five *amicus* briefs, since it was founded, in state and federal appellate courts throughout the United States. United Policyholders' *amicus* brief was cited in the U.S. Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999). UP was the only national consumer organization to submit an amicus brief in the landmark case of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). The organization has participated by court invitation in briefing and oral argument, and

many of the arguments from United Policyholders' *amicus curiae* briefs have been cited with approval by reviewing courts.

United Policyholders was previously granted leave to file an *amicus curiae* brief in the United States Court of Appeals for the Fifth Circuit, in the matter of *Motiva Enterprises, LLC v. St. Paul Fire & Marine Insurance Company*, 457 F.2d 459 (5th Cir. 2006).

This case concerns the interpretation of an exclusionary clause in an insurance policy by homeowners against their insurer. It has significant ramifications for insurance policyholders seeking to ascertain and understand their rights following wide-scale natural disasters, such as Hurricane Katrina. This matter will have a substantial impact on other policyholders, and will also impact the consistency of court decisions on a statewide and national basis, in determining how to review such exclusionary clauses. This is an area of the law in which United Policyholders and the undersigned attorneys submit it would be useful to the Court to allow the insurance policyholders' perspective to be heard.

The undersigned counsel for United Policyholders have significant experience in first-party insurance litigation against major insurance companies, such as the Appellant in this matter, and believe that they will be able to provide assistance in analyzing the issues in this case and their public policy implications in a way that compliments the arguments raised by counsel for the parties to this

appeal. Counsel for United Policyholders are retained *pro bono*, and will accept no money for their legal work in this case.

ARGUMENT

I. The business of insurance serves the public trust. Courts and legislatures recognize the unique nature of insurance policy interpretation.

The field of insurance is different from any other business involving commercial contracts, based on its high degree of interaction with a potentially vulnerable portion of the consuming public. As explained in an insurance industry treatise, *The Legal Environment of Insurance*, in its chapters on Insurance Contract Law:

> **Public Interest**
>
> Insurance contracts are different from other commercial contracts because insurance is more a necessity than a matter of choice. Therefore, insurance is a *business affected with a public interest*, as reflected in legislative and judicial decisions.
>
> State laws restrict contractual rights for insurers in the public interest. For example, insurers cannot consider an applicant's race or religion in determining acceptability or rate classification. Many jurisdictions have adopted legislation limiting the insurers' rights to reject, cancel, or refuse to renew certain types of insurance….

James J. Lorimer et al., *The Legal Environment of Insurance* 179 (American Institute for Chartered Property Casualty Underwriters, 4th ed. 1993).

The insurance industry is highly regulated, in part, because of the public importance of insurance in today's modern society. From one industry expert's perspective:

> Because the essence of the insurance contract is a promise to provide benefits in the future, perhaps years after the premiums are paid, the essence of insurance regulation is the enforcement of that promise in real, practical terms by making certain that insurers have adequate, liquid funds to pay claims, whether days or decades after the corresponding premiums have been paid In addition to solvency, insurance regulation is largely devoted to making certain that all legitimate needs for insurance are met, and to promoting fairness and equity on the part of insurers in their dealings with policyholders and claimants, with regard to the content of policies, premium classifications and rates, and marketing and claim practices.

Peter M. Lencsis, *Insurance Regulation in the United States, an Overview for Business and Government* viii (Quorum Books 1997).

Courts throughout the country and state departments of insurance recognize this public importance of insurance contracts, as well as the vulnerability of consumers in dealing with insurance companies and the policies those companies sell. The regulatory scheme surrounding insurance has a long history and its effect and importance are widely accepted.

> … [R]egulation of the insurance industry is necessary. As the United States Supreme Court has long recognized, insurance is a business coupled with a public interest. Consumers invest substantial sums in insurance coverage in advance, but the value of the insurance lies in

> the future performance of the various contingent obligations. Because the interests protected are so important – including an individual's future ability … to replace damaged or destroyed property – regulation of the industry furthers public welfare. Related reasons for insurance regulation center on the complexity of insurance and consumers' inability to obtain and understand information about insurance. Consumers are ill-equipped to assess a company's future solvency, to compare the coverage of various policies, or to evaluate a company's claim service. Theoretically, government regulation of insurance eliminates these problems. Regulation can ensure solvency and the insurer's ability to pay claims in the future, standardize policy coverage, require minimum coverage, and require fair claims processing.

Susan Randall, *Article: Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners,* 26 Fla. St. U. L. Rev. 625, 627 (1999) (footnotes omitted).

The federal government recognizes that states must regulate the insurance industry. According to the McCarran-Ferguson Act, the business of insurance will be subject to state law:

> …Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011 (2006).

Because of this unique nature of insurance, courts and legislators have promulgated a specialized field of common law and numerous safeguards, rules,

statutes, and regulations to provide protection to consumers. Most law schools teach "insurance law" as a specialized study.

II. Insurance policies are complicated contracts of adhesion. The public needs the protection of specific rules of insurance policy interpretation.

The complex nature of insurance was explained in *The Legal Environment of Insurance* as follows:

"**Flood of Darkness"**

In reviewing the language of a fire insurance policy in 1873, a court stated as follows:

> Whether [people] ought to be what they are, or not, the fact is, that in the present condition of society, men in general cannot read and understand these insurance documents…Forms of applications and policies, of a most complicated and elaborate structure, were prepared, and filled with covenants, exceptions, stipulations, provisos, rules, regulations, and conditions, rendering the policy void in a great number of contingencies…The compound, if read by [an insured], would, unless he were an extraordinary man, be an inexplicable riddle, a mere flood of darkness and confusion…It was printed in such small type, and in lines so long and so crowded, that the perusal of it was made physically difficult, painful, and injurious. Seldom has the art of typography been so successfully diverted from the diffusion of knowledge to the suppression of it. There was ground for the premium payer to argue that the print alone was evidence, competent to be submitted to a jury, of a fraudulent plot …[1]

[1] *De Lancy v. Ins. Co.*, 52 N.H. 581 (1873).

In another court case, in 1975, the court decided that the holders of an insurance policy were not bound by its provisions because its printing was of "a size type that would drive an eagle to a microscope." The court added the following:

> It cannot be reasonably assumed that the insured having average sight of a human being would be aware of the content of the questioned clause, at least in the absence of special optical equipment…It should not be necessary for the insured to provide himself with a microscope in order to inspect the small print contained within his insurance policy. Neither should it be necessary for an insured to provide himself with an insurance policy to protect himself against the provision to be found within such small print of his insurance policy.[2]

A state insurance department study of the readability of insurance policies measured the standard automobile policy by the Flesch Readability Scale. This scale assesses the readability of written documents by assigning point values for length and complexity of sentence structure. The higher the total score, the more readable the document. For the passage selected for this particular study, the Bible received a readability score of 66.97, and Einstein's Theory of Relativity scored 17.72. Both scored higher as to readability then the standard automobile policy at 10.31.

Current trends in insurance policy construction are toward more simplified language. Any new language in insurance contracts, however, requires interpretation by the courts. Therefore, the success of efforts at clearer expression remains to be seen.

… Insurance contracts cover fortuitous events, are contracts of adhesion and indemnity, must have the public interest in mind, require the utmost good faith, are executory and conditional, and must honor reasonable expectations.

The Legal Environment of Insurance 176-77.

[2] *Drake v. Globe American Casualty Company,* Ohio 10th Circuit Court of Appeals, unreported case No. 74AP-472, March 11, 1975.

A particularly scholarly discussion explaining why insurance is treated differently by courts is found in an article written by Professor Henderson of the University of Arizona College of Law, which includes the following discourse:

> In a free enterprise system, economic development steadily increases the number of situations in which individuals can suffer "loss." At the same time, economic development enhances the ability to avoid the prospect of "loss." In other words, in a relatively affluent society, there is much more to lose in the way of property and other economic interests as the human condition improves. In such a society, however, individuals are more likely to have the requisite discretionary income to transfer and to spread the attendant risks of loss. Disruptive losses to society, as well as to the individual, are obviated or minimized by private agreements among similarly situated people. In this way, the insurance industry plays a very important institutional role by providing the level of predictability requisite for the planning and execution that leads to further development. Without effective planning and execution, a society cannot progress.
>
> …
>
> This perceived social significance has set apart insurance contracts from most other contracts in the eyes of the law. Insurance is purchased routinely and has become pervasive in our society. It protects against losses that otherwise would disrupt our lives, individually and collectively. The public interest, as well as the individual interests of millions of insureds, is at stake. This is the foundation for the general judicial conclusion that the business of insurance is cloaked with a public purpose or interest. This perception also explains the extensive regulation of the insurance industry in the United States, not just through legislative and administrative processes, but also through the judicial process.
>
> …
>
> The insureds' disadvantage persisted as insurance took on more and more importance in this country. In order to purchase a home or a car, or commercial property, most people had to borrow money, and

> loans were not obtainable unless the property was insured. In addition, the lender often required that the life of the borrower be insured. … The purchase of insurance was no longer a matter of prudence; it was a necessity. Then losses occurred and the inevitable disputes arose. These disputes, however, were not about an even exchange in value. Rather, they were about something quite different.
>
> Insureds bought insurance to avoid the possibility of unaffordable losses, but all too often they found themselves embroiled in an argument over that very possibility. Disputes over the allocation of the underlying loss worsened the insureds' predicament. In most instances, insureds were seriously disadvantaged because of the uncompensated loss; after all, the insured would not have insured against this peril unless it presented a serious risk of disruption in the first place. The prospect of paying attorneys' fees and other litigation expenses, in addition to the burden of collecting from the insurer, with no assurance of recovery, only aggravated the situation.
>
> These additional expenses could prove to be a formidable deterrent to the average insured. For most insureds, unlike insurers, such expenses were not an anticipated cost of doing business. Insureds did not plan for litigation as an institutional litigant would. Insurers, on the other hand, built the anticipated costs of litigation into the premium rate structure. In effect, insureds, by paying premiums, financed the insurers' ability to resist claims. Insureds, as a group, were therefore peculiarly vulnerable to insurers who, as a group, were inclined to pay nothing if they could get away with it, and, in any event, to pay as little as possible. Insurance had become big business.

Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies By Statute*, 26 U. Mich. J.L. Reform 1, 10-14 (1992).

These points, as well as an explanation of how courts should perceive the parties to an insurance relationship has been summed up as follows:

> [A]n insurance policy is not an ordinary contract. It is a complex instrument, unilaterally prepared, and seldom understood by the assured… The parties are not similarly situated. The company and its representatives are experts in the field; the applicant is not. A court should not be unaware of this reality and subordinate its significance to strict legal doctrine.

Prudential Ins. Co. v. Lamme, 425 P.2d 346, 347 (Nev. 1967).

III. As a result of the complexities of insurance and the need for consumer protection, courts have created and recognized special rules for dealing with insurance contract interpretation, and Mississippi law follows these traditional rules.

Importantly, insurers sell standardized insurance policy forms, and the ability of a potential policyholder to negotiate the policy's terms or to comparison shop for an insurance policy is unrealistic in today's marketplace. Because of the complex nature of the business of insurance, and in order to protect policyholders and create consistency, courts utilize recognized rules of policy construction in their dealings with insurance policy litigation.

Mississippi courts view insurance policies as contracts of adhesion and therefore understand that the protection of the policyholder is paramount. *See, e.g.*, *Lewis v. Allstate Ins. Co.*, 730 So. 2d 65 (Miss. 1998).

> It is a matter almost of common knowledge that a very small percentage of policyholders are actually cognizant of the provisions of their policies and many of them are ignorant of the names of the companies issuing the said policies. The policies are prepared by the

> experts of the companies, they are highly technical in their phraseology, they are complicated and voluminous and in their numerous conditions and stipulations furnishing what may be veritable traps for the unwary. Courts, while zealous to uphold legal contracts, should not sacrifice the spirit to the letter nor should they be slow to aid the confiding and innocent.

Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172, 1188-89 (Miss. 1990) (citations omitted). Thus, courts in Mississippi utilize rules of policy construction to protect the weaker policyholder from overreaching by the stronger insurer. Jeffrey Jackson, *Mississippi Insurance Law and Practice, Mississippi Practice Series* § 1:3 (Thomson/West 2006).

If an insurance policy is clear and unambiguous, the policy's meaning and effect is a matter of law which is to be determined by the court. *See, e.g.*, *Overstreet v. Allstate Ins. Co.*, 474 So. 2d 572, 575 (Miss. 1985). In such a situation, the policy is to be interpreted and enforced as written. *See Jackson v. Daley*, 739 So. 2d 1031, 1041 (Miss. 1999); *Shaw v. Burchfield*, 481 So. 2d 247 (Miss. 1985).

Only if language in a policy is deemed ambiguous are rules of construction employed or extrinsic evidence introduced. *See, e.g., Burton v. Choctaw County*, 730 So. 2d 1 (Miss. 1997). Policy language will be found ambiguous if it is reasonably susceptible to more than one interpretation. *See Universal Underwriters Ins. Co. v. Buddy Ford Lincoln-Mercury, Inc.*, 734 So. 2d 173, 176 (Miss. 1999) (citations omitted).

> Where there is doubt as to the meaning of an insurance contract, it is universally construed most strongly against the insurer, and in favor of the insured and a finding of coverage. The basic reason that uncertainty is decided in favor of the insured is that the insurer prepares the policy and should not be allowed by the use of obscure or ambiguous exceptions to defeat the purposes for which the policy was sold. Thus, "in accord with the general standard of giving effect to the purpose of the contract, the rule is that provisos, exceptions, or exemptions, and words of limitation in the nature of an exception, are strictly construed against the insurer, where they are of uncertain import or reasonably susceptible of a double construction."

Id. at 176-77 (internal citations omitted).

Findings of ambiguity can exist in several types of circumstances. For example, the meaning of a specific term in a policy can be found ambiguous based on two reasonable interpretations, one suggested by the insurer and one by the insured. *See id.* at 176 (finding the term "loss" ambiguous as each party had given a plausible interpretation of the term).

Importantly, a policy's language can be found ambiguous where different sections of the policy are in conflict with each other. *See, e.g., Crum v. Johnson*, 809 So. 2d 663, 665-66 (Miss. 2002) (finding an ambiguity where the personal liability section of the policy conflicted with the medical coverage section, creating an ambiguity). As explained by the Mississippi Supreme Court:

> This Court has noted that internal conflict or uncertainty can provide the necessary condition precedent to find ambiguity. For instance, if one section of a policy conflicts with another, the inherent uncertainty within the policy creates an obscurity and thus ambiguity. This step of the analysis is important because the contract must be viewed as a whole. All parts must be harmonized as much as reasonably possible,

> and no part or word can be stricken unless the result is fairly inescapable.

Miss. Farm Bureau Mut. Ins. Co. v. Walters, 908 So. 2d 765, 769 (Miss. 2005) (internal citations omitted).

If the language of an insurance contract is deemed ambiguous, the policy's interpretation is a question for the court to decide. *See Blackledge v. Omega Ins. Co.*, 740 So. 2d 295 (Miss. 1999) (citing *McFarland v. Utica Fire Ins. Co.*, 814 F. Supp. 518 (S.D. Miss. 1992)). The court is to give the ambiguous language an interpretation favoring the insured, and an interpretation providing a greater indemnity to the insured should be adopted. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Scitzs*, 394 So. 2d 1371, 1372-73 (Miss. 1981). It is for this reason that exclusions are strictly construed against the insurer and in favor of the insured. *Miss. Farm Bureau Mut. Ins. Co. v. Jones*, 743 So. 2d 1203 (Miss. 2000). Because of this rule, and because an exclusion to coverage is an affirmative defense raised in litigation between an insured and insurer, the insurer has the burden to prove the applicability of an exclusion to coverage. *Commercial Union Ins. Co. v. Byrne*, 248 So. 2d 777 (Miss. 1971); *Lititz Mut. Ins. Co. v. Boatner*, 254 So. 2d 765 (Miss. 1971).

Moreover, the public policy of the State of Mississippi and an insured's objectively reasonable expectations may be taken into consideration when determining whether coverage exists under an insurance policy. *See, e.g., Allstate*

Ins. C. v. Chi. Ins. Co., 676 So. 2d 271, 275 (Miss. 1996); *Bland v. Bland*, 629 So. 2d 582 (Miss. 1993); *Brown v. Blue Cross & Blue Shield of Miss.*, 427 So. 2d 139, 141 (Miss. 1983).

IV. The District Court appropriately found State Farm's anti-concurrent causation language does not preclude coverage when viewed in the context of a hurricane or windstorm claim.

The devastation and destruction that occurred to the gulf coast states as a result of Hurricane Katrina is unprecedented. Although the insurance industry encountered much prior experience in handling widespread hurricane claims before Hurricane Katrina struck, the unique nature of these claims presented novel issues for both policyholders and insurers. Significantly, many insurers, including State Farm, had not dealt with the unusual coverage questions that arose in the circumstances surrounding the wind and water scenario under Mississippi insurance law. As such, although the prior body of insurance law can provide a framework for dealing with these cases, they cannot necessarily stand as a rigid precedent for determining how these claims should be dealt with under the situation at hand. Moreover, it is important to recognize the far-reaching effect on other cases that will flow from this Court's decision on the matter at hand.

With respect to the *Tuepker* lawsuit, State Farm claims that the District Court erred in finding that its "anti-concurrent causation" clause is ambiguous. In support of this argument, State Farm cites *Boteler v. State Farm Casualty Ins. Co.*,

876 So. 2d 1067 (Miss. Ct. App. 2004) and *Rhoden v. State Farm Fire & Casualty Co.*, 32 F. Supp. 2d 907 (S.D. Miss. 1998) (Mississippi law), *aff'd*, 200 F.3d 815 (5th Cir. 1999). In both of these cases, under the facts as presented and procedural posture at hand, the courts upheld State Farm's "earth movement" exclusion and ruled against a finding of coverage for the claims.

Although State Farm hopes to convince this Court that the cited cases demonstrate that the District Court erred in finding the State Farm policy language ambiguous in the context of a hurricane claim, a careful comparison of the cases proves this is not the case. Significantly, in *Rhoden*, the matter was decided at the summary judgment stage, and the court noted that the record was devoid of any evidence to indicate there was any loss which would not have occurred in the absence of the excluded event. *See Rhoden*, 32 F. Supp. 2d at 912. Moreover, the question of ambiguity raised by the insured in that case involved the "earth movement" exclusion, when the insured argued that the exclusion should only apply to natural, not man-made events. *See id.* The *Rhoden* court discounted the argument, noting that the exclusion contained language demonstrating that the exclusion was not to be read in a way that would be as limited as the explanation proposed by the insured. *See id.*

In *Boteler*, the appellate court was again confronted with a summary judgment motion directed toward the "earth movement" exclusion of the State

Farm policy. *See Boteler*, 876 So. 2d at 1069. The court looked to the definition of "earth movement", and again rejected the insured's argument that the exclusion was to only apply to natural, and not other, causes. *See id.* at 1070.

Significantly, neither case looked to the lead-in language comprising the so-called "anti-concurrent causation" clause in the context of an event that resulted in loss from both a covered and an arguably non-covered cause. As such, neither *Rhoden* nor *Boteler* provides guidance to this Court on the proper analysis in addressing whether the State Farm clause could create an ambiguity under the circumstances following the devastation of Hurricane Katrina.

In this case, the District Court's *Tuepker* opinion took into careful consideration the body of insurance law handed down by courts in the State of Mississippi. However, with that being said, the District Court was also faced with a unique set of circumstances requiring a cutting-edge analysis that had not been previously addressed in this state. The rules of policy construction require the court to look at the policy in its entirety, and ascertain if an ambiguity exists. Mississippi law allows for a finding of ambiguity where two or more policy provisions cannot be reconciled. *See, e.g., Miss. Farm Bureau Mut. Ins. Co. v. Walters*, 908 So. 2d 765, 769 (Miss. 2005). Mississippi law further allows a finding of ambiguity where a policyholder's objectively reasonable expectations of

coverage would be thwarted by a ruling in favor of the insurer. *See, e.g., Brown v. Blue Cross & Blue Shield of Miss.*, 427 So. 2d 139, 141 (Miss. 1983).

In the instant case, the District Court reviewed the policy as a whole, and noted that it carried a specific "Hurricane Deductible Endorsement", indicating the policy was intended to cover damage due to the effects of rain, wind, and moving objects during the hurricane event, regardless of damage caused by rising waters. Moreover, the policy specifically listed "**Windstorm or Hail**" as a covered peril under the personal property portion of the policy. Certainly, Hurricane Katrina may be the ultimate "windstorm". As such, the District Court found that the "weather" exclusion was ambiguous, as was the lead-in "anti-concurrent causation" clause that prefaced the "water" exclusion. In its analysis, the District Court determined that these exclusions purport to exclude coverage for wind and rain damage, which was intended to be covered by the policy. *See also Leonard v. Nationwide Mut. Ins. Co.*, 438 F. Supp. 2d 684 (S.D. Miss. 2006) (explaining that if these policies were read to exclude wind damage that occurs at or near the time that excluded water damage occurs, the result would be contrary to Mississippi law, and would render the windstorm coverage illusory for homeowners who live in areas where flooding may occur).

As Judge Senter explained in *Leonard:*

> Read literally, this provision would exclude any otherwise covered loss, e.g. windstorm damage, in any circumstance where "weather

> conditions," i.e. the windstorm, combined with an excluded cause of loss, e.g. flooding, to damage the insured property. This reading of the policy would mean that an insured whose dwelling lost its roof in high winds and at the same time suffered an incursion of even an inch of water could recover nothing under his Nationwide policy. Read literally, this provision would exclude all coverage when a windstorm did damage to both an insured dwelling (a covered loss) and adjacent "screens, including their supports, around a pool, patio, or other area." (an excluded loss). I do not believe this is a reasonable interpretation of the policy.

Leonard at 694.

In light of Mississippi law on insurance policy construction, this Court should find no reason to reject the District Court's findings of coverage under the State Farm policy. No controlling Mississippi authority contradicts the conclusions of the District Court, noting that disputes in the evidence should be determined by the trier of fact. The court's finding of ambiguity was not inappropriate or improper.[3] Alternatively, one could also argue that a true and plain reading of the policy provision indicates that the "anti-concurrent causation" clause does not result in the exclusion of wind damage that "would not have occurred in the absence of" water damage, and therefore does not apply to the factual scenario advanced in this case or in other cases involving Hurricane Katrina losses.

[3] The *Tuepker* opinion did not address the applicability of the policy's additional coverage for "collapse", which may also apply to a Hurricane Katrina total loss and to which the "water" exclusion and the "anti-concurrent causation" clause may not apply. This provision may also be relied upon to negate State Farm's attempts to disclaim coverage.

This Court's decision will have a far-reaching effect on policyholders throughout the state, and an affirmance of coverage will advance the public purpose of indemnity for a covered loss and protection of the citizens of Mississippi.

V. State Farm wrongly attempts to turn a policy covering all "accidental direct physical loss" into a "named peril" policy by changing the traditional burden of proof and placing it on the policyholder.

Even if the court were to attempt to give effect to the convoluted lead-in language of State Farm's policy, there is no reasonable reading of it that would compel a different result from that reached by the District Court. The analysis begins, of course, with the insuring provision which State Farm chose to use in its standard homeowners policy, which provides:

SECTION I – LOSSES INSURED

COVERAGE - A - DWELLING

We insure for accidental direct physical loss to the property described in Coverage A [and Coverage B], except as provided in **SECTION 1 - LOSSES NOT INSURED.**

It is universally held that when such insuring language is at issue, the policyholder bears the burden to establish that an "accidental direct physical loss" was sustained to the covered property and the amount of the "accidental direct physical loss" sustained. Where the insured proves that his dwelling is totally

destroyed by a hurricane, as State Farm admits occurred in this case (State Farm brief at p. 4), the burden of establishing an accidental direct physical loss is met.[4] The policyholder would then only need to establish the amount of the total loss, which the policy defines as the replacement cost or actual cash value of the destroyed dwelling, subject to policy limits.

Far from a model of clarity, the lead-in language State Farm chose to use in its LOSSES NOT INSURED section is replete with double negatives and circular reasoning which is indecipherable to a skilled wordsmith, much less the ordinary policyholder. In any event, the lead-in and "water damage" exclusion state as follows:

SECTION I - LOSSES NOT INSURED

* * *

2. We do not insure under any coverage for ***any loss which would not have occurred in the absence of one or more of the following excluded events***. We do not insure for ***such loss*** regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arising from

[4] It is impossible to imagine all of the possible causes of accidental direct physical loss that could occur during a hurricane. Damage could result from, among other things, rainwater, direct force of wind (tornado, microburst, gust, sustained winds), windborne debris, rising water, wave action, waterborne debris blown by wind, felled trees, falling objects, undermining caused by erosion, fire caused by a ruptured gas line, or a combination of any of them. The State Farm policy, by its own terms, covers all accidental direct physical loss unless it can be proven that a "loss not insured" applies.

> natural or external forces, or occurs as a result of any combination of these:
>
> * * *
>
> c. **Water Damage,** meaning:
>
> (1) flood, surface water, waves, tidal water, tsunami, seiche, overflow of a body of water, or spray from any of these, all whether driven by wind or not;

There is no fair reading of this exclusionary language that would compel a different result from that reached by the District Court with respect to the burden of proof and the fact that State Farm must provide coverage for damage that is not caused by an excluded event. Indeed, in discussing the lead-in language to the losses not insured section of its policy, State Farm concedes "(i)t plainly states that 'any loss which would not have occurred in the absence of' certain excluded events, including water damage, is not covered under the policy, 'regardless of' the operation or effect of other causes of the loss." State Farm Brief at p. 8. Under the Mississippi Supreme Court's allocation of the burden of proof, State Farm then has the burden of proof to establish what portion of the accidental direct physical "loss which would not have occurred in the absence of" an excluded event.

State Farm further recognizes that it must cover damage that occurs in the absence of an excluded event: "The anti-concurrent cause language does not apply, for example, in a circumstance where there is separate damage attributable

to wind, even if there is also water damage. Thus if the lower story of a house is flooded and the roof is separately damaged by wind, the roof damage would not have 'occurred in the absence of' the water damage and is covered." State Farm Brief at p. 8, fn 4.

In its brief, State Farm recognizes the practical difficulties in proving what portion of an accidental direct physical loss is excluded in cases where the insured dwelling is totally destroyed and removed from the premises as a result of a hurricane:

> Requiring the insurer not only to prove the effect of the excluded peril but also to quantify the scope and extent of any separate damage caused by the covered peril leads to totally anomalous results. For example, if an insured dwelling were completely destroyed by floodwaters during a hurricane, but the insurer could not conclusively disprove the possibility that the dwelling sustained some damage by wind prior to its destruction, it could be argued that the insurer has failed to meet its burden of quantifying the amount of loss attributable to the excluded peril of flood and thus must pay policy limits, no matter how unlikely the fact of separate wind damage or how minimal the extent of such damage, if any.

State Farm brief at p. 41, fn 23.

Ironically, State Farm's solution to the difficult quandary of determining which of the powerful forces unleashed in a hurricane caused what type of damage to a missing structure is to "shift back" to the policyholder this burden by making the creative, and unsupported, argument that once it shows that flooding *may* have caused some damage to the dwelling, the burden of proof shifts back to the

policyholder to prove the amount of the accidental direct physical loss that was caused by non-excluded perils. To do this State Farm cobbles together an array of cases involving named peril policies, life insurance policies, and off-point decisions from other jurisdictions. *See, e.g., Harbor House Condominium Ass'n v. Mass. Bay Ins. Co.*, 915 F.2d 316 (7th Cir. 1990) (finding that the insured did not meet its initial burden of proving the amount of damage); *Brown v. PFL Life Ins. Co.*, 312 F. Supp. 2d 868 (N.D. Miss) (life insurance policy). Moreover, none of the cited cases included State Farm's unique "would not have occurred in the absence of" language, and cannot be seen as comparable to the State Farm policy language.

The District Court properly recognized that State Farm is trying to rely upon its exclusion to coverage that is essentially an affirmative defense to the litigation, even though the District Court's opinion was issued upon review of a motion to dismiss the complaint. It is black letter law that an insurer has the burden of proving the applicability of an exclusion to coverage. *See, e.g., Lunday v. Lititz Mut. Ins. Co.*, 276 So. 2d 696 (Miss. 1973). State Farm recognizes this rule of law in its Initial Brief, and its own personnel have admitted this requirement in depositions taken in other Hurricane Katrina-related cases against State Farm. *See excerpts from Deposition of Stephen Hinkle,* taken Oct. 10, 2006, in the matter of *Guice v. State Farm Fire & Casualty Company,* Case No.: 1:06cv1, pending in the

United States District Court for the Southern District of Mississippi. (A copy of these excerpts, which were filed in the *Guice* matter, are attached as Exhibit A to this Brief). In the *Guice* lawsuit, Mr. Hinkle, a fire claim consultant, testified that, in a Hurricane Katrina loss, once the homeowner can show an accidental direct physical loss, such as the complete destruction of the home following Hurricane Katrina, then the burden shifts to State Farm to show what part of the loss falls within an exclusion to coverage. In this case, State Farm's obligation would be to prove what part of the loss "would not have occurred in the absence of" water.

Indeed, informative treatises used in the industry of insurance policy adjusting identify the coverage afforded under this type of policy, and the burden of proof. *See, e.g.*, Donna J. Popow, *Property Loss Adjusting* § 3.30 (American Institute for Chartered Property Casualty Underwriters/Insurance Institute of America 3d ed. 2003) ("Coverage is provided for direct physical loss to property unless the loss is caused by a peril specifically excluded by the policy or the policy specifically limits the amount of coverage"); Doris Hoopes, *The Claims Environment* § 2.10 (Insurance Institute of America 2d ed. 2000) ("Any loss caused by a peril that is *not* listed among the exceptions (such as fire) is covered.")

Significantly, State Farm tries to turn the policy language on its head, and attempts to place the burden on the policyholder to prove what part of the loss was

not caused by flood waters. State Farm's Initial Brief cites an impressive array of case law discussing the "shifting" of the respective burdens of proof on the issue of wind versus water damage. Yet State Farm refuses to acknowledge it initially must demonstrate that all or part of the loss "would not have occurred in the **absence** of" flood waters. Until State Farm is able to meet this burden, its policyholder has no obligation to help the insurer prove its position. Again, it is the province of the jury to determine the proximate cause of the loss based on the evidence presented. *See Grace v. Lititz Mut. Ins. Co.*, 257 So. 2d 217 (Miss. 1972). *See also Guice v. State Farm Fire & Cas. Co.*, No. 1:06cv1, 2006 U.S. Dist. LEXIS 57571 (S.D. Miss. Aug. 14, 2006).

As was explained by Judge Senter in *Leonard v. Nationwide Mut. Ins. Co.*, 438 F. Supp. 2d 684, 695 (S.D. Miss. 2006):

> The [policyholders] have the burden of proving that the insured property was damaged or destroyed by a cause within the insuring language of the policy during the time the policy was in force. For their structure, this requires the [policyholders] to prove that there was a direct accidental physical loss to the property.

Once the policyholder meets this initial burden, then the insurer must disprove wind damage. In *Leonard*, Judge Senter noted that Nationwide did not attempt to completely deny coverage based on its water exclusion and, in that case, the insurer presented evidence at trial to demonstrate the amount of water damage. *See Leonard* at *25-26.

In another recent noteworthy Hurricane Katrina case, Judge Senter noted that State Farm's evidence at trial did not disprove wind damage. *See Broussard v. State Farm Fire & Casualty Co.*, No. 1:06cv6, 2007 U.S. Dist. LEXIS 2611, *6-7 (S.D. Miss. Jan. 11, 2007). As was explained in *Broussard*, once the policyholder demonstrated damage during Hurricane Katrina, the burden shifted to State Farm to prove what portion of the total loss was attributable to flood damage and therefore excluded. *See Broussard* at *4.

State Farm's claims personnel admit what State Farm refuses to acknowledge through its legal counsel. State Farm may not wish to recognize that it inserted the requirement into the policy that it must first demonstrate wind damage would not have caused any of the loss. But that is what the policy requires, and this Court must not ignore the policy's language on that subject. Accordingly, it is the traditional burden insurers selling all-risk policies have always acknowledge. The District Court's finding of coverage should not be disturbed on appeal.

CONCLUSION

In conclusion, for the reasons set forth above, the District Court's opinion finding that the State Farm "anti-concurrent causation" lead-in clause does not preclude coverage, and imposing the burden on State Farm to prove that the

exclusion applies to the policyholders' claim, was appropriate and should be affirmed by this Court.

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CERTIFICATE OF SERVICE

I, William F. Merlin, Jr., an attorney for United Policyholders, hereby certify that this 10th day of April, 2007, the *Amicus Curiae* Brief has been sent to the United States Court of Appeals for the Fifth Circuit both paper form and electronic

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